84422-4

Supreme Court Case No. _____
Court Of Appeals, Division I Case No. 62700-7-I

SUPREME COURT
OF THE STATE OF WASHINGTON

Donia Townsend and Bob Perez, individually, on behalf of their marital community, and as class representatives; Paul Ysteboe and Jo Ann Yesteboe, individually, on behalf of their marital community, and as class representatives, Vivian Lehtinen and Tony Lehtinen, individually, on behalf of their marital community and on behalf of their minor children, Niklas and Lauren; Jon Sigafoos and Christa Sigafoos, individually, on behalf of their marital community and on behalf of their minor children, Colton and Hannah,

Plaintiffs-Respondents,

vs.

The Quadrant Corporation, a Washington Corporation; Weyerhaeuser Real Estate Company, a Washington Corporation; and Weyerhaeuser Company, a Washington Corporation

Defendants-Appellants.

ANSWER TO PETITION FOR REVIEW

HILLIS CLARK MARTIN & PETERSON, P.S.
Michael R. Scott, WSBA #12822
Laurie Lootens Chyz, WSBA #14297
Jake Ewart, WSBA #38655
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Treatises

I. INTRODUCTION

The Petition for Review should be denied. This action involves the routine enforcement of a clear and commonly-used arbitration provision in a residential real estate purchase and sale agreement ("PSA"). Washington law favors arbitration as a means of resolving disputes, and the Court of Appeals, Division One, properly held that all claims in this action are subject to arbitration. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 891-92, 16 P.3d 617 (2000) (Washington law favors arbitration). The Court of Appeals issued an opinion (the "Opinion") based on well-established arbitration law that aligns not only with the decisions of this Court and the Court of Appeals, but also with the arbitration law of other jurisdictions. Petitioners' appeal presented no issues of constitutional law, and no novel or unsettled issues of significant public interest. Because this appeal was properly decided by the Court of Appeals, review by this Court is unnecessary.

II. ISSUES FOR REVIEW

A. Did the Court of Appeals properly conclude that all claims asserted by all plaintiffs are arbitrable pursuant to Washington law?

B. Did the Court of Appeals properly reserve challenges to the enforceability of the PSAs for the arbitrator pursuant to Washington statutory and decisional law?

C. Did the Court of Appeals properly hold that a party preserves its right to compel arbitration by moving to compel after challenging its status as a proper party to the lawsuit?

III. STATEMENT OF THE CASE

These actions were commenced by four pairs of homeowners (the "Homeowners") who purchased houses designed, built, and sold by defendant-respondent The Quadrant Corporation ("Quadrant").[1] CP 39-48, 50-59, 171-92, 633-51. Quadrant is a wholly owned subsidiary of defendant-respondent Weyerhaeuser Real Estate Company ("WRECO"), which is a wholly-owned subsidiary of defendant-respondent Weyerhaeuser Company ("Weyerhaeuser"). CP 61. The Homeowners are Donia Townsend and Bob Perez (the "Perezes"), Paul and Jo Ann Ysteboe, Vivian and Tony Lehtinen, and Jon and Christa Sigafoos.

The Homeowners claim that their houses have construction defects. CP 1-27, 742-64, 765-87. Their complaints are virtually identical, and each states claims for (1) outrage, (2) fraud, (3) violation of the Consumer Protection Act (CPA), (4) negligence, (5) negligent misrepresentation, (6) rescission, (7) breach of warranty, and (8) "Declaration of Unenforceability of Arbitration Clause in Purchase and

[1] As is noted in the Petition for Review, Homeowners Paul and Jo Ann Ysteboe, Donia Townsend, and Bob Perez filed a purported class action. Pet. for Review at 4. No class has been certified.

Sale Agreement." *Id.* Two pairs of Homeowners, the Lehtinens and the Sigafooses, also assert these very same eight claims on behalf of their children. CP 742-64, 765-87. Because the claims asserted by the parents and children are identical, including claims for breach of warranty and rescission, and are based on the very same factual allegations, the children are mentioned separately only three times in the complaints: once in the opening sentence, once in a paragraph where the plaintiffs are identified, and once in the eighth cause of action where the Homeowners contend that the children's claims are not arbitrable. *Id.* Otherwise, the Lehtinens, Sigafooses, and their children are described collectively as "Plaintiffs" throughout the complaints. *E.g.*, CP 752, 775 ("Plaintiffs did not receive the homes they bargained, expected or paid for as their Quadrant homes were neither properly built nor safe and healthy to live in.").

On January 11, 2008, Quadrant moved to compel arbitration of all claims asserted by the Perezes and Ysteboes (the Lehtinens and Sigafooses had not yet filed suit). CP 28-33. The motion was made pursuant to Washington's Uniform Arbitration Act, RCW 7.04A.010 *et seq.*, and was based on the arbitration provision included just above the signature lines in the PSAs signed by the Perezes and Ysteboes:

> Any controversy or claim arising out of or relating to this Agreement, any claimed breach of this Agreement, or any claimed defect relating to the Property, including, without

> limitation, any claim brought under the [CPA], (but excepting any request by Seller to quiet title to the Property) shall be determined by arbitration commenced in accordance with RCW 7.04.060.

CP 48, 59. The trial court took Quadrant's motion under advisement.

Also on January 11, 2008, WRECO and Weyerhaeuser moved for summary judgment on the basis that they had no connection to the Perezes or Ysteboes, or to the houses at issue, and were therefore improper parties to the lawsuit. CP 790-801. That motion was denied without prejudice on February 8, 2008, CP 342, and a subsequent motion for reconsideration was denied on March 17, 2008, CP 1001-02.[2]

On September 18, 2008, Quadrant moved to compel arbitration of the claims brought by the Lehtinens and Sigafooses. CP 197-209. The PSAs signed by the Lehtinens and Sigafooses contained the same arbitration provision quoted above. CP 178, 640. WRECO and Weyerhaeuser also moved to compel arbitration of the claims asserted against them by all four pairs of Homeowners.[3] CP 213-25.

---

[2] At a hearing held on November 10, 2008, the trial court indicated that it intended to reconsider and grant WRECO's and Weyerhaeuser's motion for summary judgment. *See* CP 1763 (Homeowners' opposition to WRECO and Weyerhaeuser proposed order: "the Court on November 10, 2008 abruptly announced that defendants WRECO and Weyerhaeuser should be 'dismissed'"); CP 1758-59. However, reconsideration of that motion is stayed pending appeal.

[3] In the trial court, the Homeowners never contended, as they now do on appeal, that WRECO and Weyerhaeuser had waived their rights to compel arbitration by previously moving for summary judgment. CP 707-21 (Homeowners' opposition brief).

After hearing oral argument on November 10, 2008, the trial court entered an order on December 2, 2008, denying all three motions to compel. CP 734-36. The trial court stated two reasons for the denials, neither of which was valid, and neither of which is adopted by the Homeowners in their Petition for Review. CP 735; Pet. for Review at 3.

Quadrant, WRECO, and Weyerhaeuser appealed the trial court's order on December 3, 2008. Oral argument on the appeal was heard in the Court of Appeals on June 8, 2009. The Court of Appeals issued an opinion on October 19, 2009, reversing the trial court's order in part, but refusing to compel tort claims to arbitration. Pet. for Review, App. A. Both parties filed motions for reconsideration, and, on December 28, 2009, the Court of Appeals granted Quadrant's motion for reconsideration, denied the Homeowners' motion for reconsideration, withdrew its first opinion, and entered a revised opinion reversing the trial court entirely. Pet. for Review, App. B. In its revised Opinion, the Court of Appeals ordered all claims, including tort claims, to arbitration.[4] *Id.* The Homeowners moved for reconsideration again, and the Court of Appeals denied that motion on February 8, 2010. The Homeowners filed their Petition for Review on March 10, 2010.

[4] In their Petition for Review, the Homeowners do not renew their argument that tort claims are not arbitrable under Washington law. Pet. for Review at 1-20.

IV. SUMMARY OF ARGUMENT

The Homeowners contend that the Court of Appeals erred in three respects. First, the Homeowners claim that, because the Lehtinen and Sigafoos children did not sign the PSAs containing arbitration clauses, the Court of Appeals improperly compelled their claims to arbitration. Pet. for Review at 11-13. Second, the Homeowners argue that the Court of Appeals improperly failed to consider evidence that the PSAs were unenforceable for reasons of procedural unconscionability. *Id.* at 13-18. Third, the Homeowners claim that, because WRECO and Weyerhaeuser moved for summary judgment at the outset of the Perez/Ysteboe action, the Court of Appeals should have held that WRECO and Weyerhaeuser waived their rights to compel arbitration of the claims asserted by the Perezes and Ysteboes. *Id.* at 18-20.

The Court of Appeals ruled correctly on all three issues. Its holdings were in accordance with the Uniform Arbitration Act, with the decisions of this Court and the Court of Appeals, and with well-settled arbitration law adopted across jurisdictions. RAP 13.4(b). Because the Court of Appeals ruled correctly, and because no issues of constitutional or public importance are at stake, review of the Court of Appeals' Opinion is unnecessary. *Id.*

V. ARGUMENT

A. The Court of Appeals Properly Concluded that the Children's Claims are Arbitrable.

The Homeowners contend that the Sigafoos and Lehtinen children cannot be compelled to arbitrate because they did not sign the PSAs containing the arbitration provisions. Pet. for Review at 11. However, in Washington, as in other jurisdictions, nonsignatories can be compelled to arbitrate under certain circumstances. For example, where a nonsignatory plaintiff bases his right to sue on a contract, any arbitration provision in that contract must also be observed. *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 896-97, 988 P.2d 12 (1999). Similarly, where a contract containing an arbitration provision forms the "underlying basis" for a nonsignatory's claims, all claims, including the nonsignatory's tort claims, are arbitrable. *In re Jean F. Gardner Amended Blind Trust*, 117 Wn. App. 235, 239, 70 P.3d 168 (2003).

Here, as the Court of Appeals properly recognized, "[t]here is no distinction in the complaints between the children's claims and the parents' claims," and, because "the source of the duty of care Quadrant owed the Homeowners and their children arises from the sale of [a] home," all of the "claims relate to the PSA." Op. at 17. Indeed, the gravamen of the complaints is that the "Plaintiffs"—parents and children alike—"did not receive the homes they bargained, expected or paid for as

their Quadrant homes were neither properly built nor safe and healthy to live in." CP 12, 752, 775. On that common factual basis, the Homeowners and their children alleged eight causes of action arising from the sales of their homes. Those claims include claims for breach of warranty and rescission, which were not mentioned by the Homeowners in their Petition for Review, and which plainly arise from contract. Pet. for Review at 4 (listing only six of the eight causes of action asserted by the Homeowners and their children); CP 24-26, 761-62, 784-85. Because the children's claims are based on an underlying contract, they are arbitrable under Washington law. *Powell*, 97 Wn. App. at 896-97. In addition, because the sale of a home forms the "underlying basis" for all of the children's claims—including tort claims—those claims are also arbitrable under Washington law. *Gardner*, 117 Wn. App. at 239 (compelling to arbitration tort claims that, like the claims here, arose from a contractual relationship). The Court of Appeals rightly compelled the children's claims to arbitration based on these legal principles.

The Court of Appeals' holdings are also consistent with this Court's recent decision in *Satomi Owners Association v. Satomi, LLC*, 167 Wn.2d 781, --- P.3d ---, 2009 WL 4985689 (Dec. 24, 2009), which involved the Federal Arbitration Act rather than Washington's UAA. In *Satomi*, this Court recognized that nonsignatories may be bound to

arbitrate under certain circumstances, and then cited several non-exhaustive examples from both state and federal jurisdictions. *Satomi*, 167 Wn.2d at *11-12. The particular circumstance at issue in *Satomi*, where a nonsignatory plaintiff was seeking to enforce claims on behalf of a signatory, is not present here, so the *Satomi* decision does not conflict with the Opinion rendered by the Court of Appeals. *See id.*

In fact, the Court of Appeals' Opinion was entirely consistent with well-established arbitration law not just in Washington, but in other jurisdictions as well.[5] *E.g.*, *Trimper v. Terminix Int'l. Co.*, 82 F. Supp. 2d 1, 4-5 (N.D.N.Y. 2000) (claims of nonsignatory family members compelled to arbitration because they were "derivative of and closely related to" the claims asserted by the signatory father); *Smith v. Multi-Financial Sec. Corp.*, 171 P.3d 1267, 1274 (Colo. Ct. App. 2007) (holding that nonsignatory suing to enforce contract is estopped from avoiding arbitration provision in same contract); *In re Ford Motor Co.*, 220 S.W.3d 21, 24 (Tex. Ct. App. 2006) (same); *Ex Parte Dyess*, 709 So.2d 447, 452 (Ala. 1997) (same); 1 Martin Domke, *Domke on Commercial Arbitration* § 13.1 (3d ed. 2003) (recognizing seven theories upon which a nonsignatory can be bound to an arbitration agreement). Because the

[5] Although this appeal was determined under Washington's UAA, Washington courts routinely look to federal and state precedent when construing and applying Washington arbitration law. *E.g.*, *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 735-36, 862 P.2d 602 (1993).

Court of Appeals properly followed settled arbitration law to compel the children's claims to arbitration, review of its Opinion is unnecessary.

B. The Court of Appeals Properly Directed to Arbitration Plaintiffs' Procedural Unconscionability Challenge to the PSAs.

The Court of Appeals also properly applied Washington law in reserving the Homeowners' procedural unconscionability claims, which target the enforceability of the PSAs, for the arbitrator.

Washington's UAA establishes distinct roles for courts and arbitrators in assessing arbitrability. Under RCW 7.04A.060(2), a court decides the validity and scope of an individual arbitration clause. However, under RCW 7.04A.060(3), "[a]n arbitrator shall decide . . . whether a contract containing a valid agreement to arbitrate is enforceable." Therefore, as the Court of Appeals properly held, "a court may entertain only a challenge to the validity of the arbitration clause itself, *not a challenge to the validity of the contract containing the arbitration clause*." Op. at 7 (emphasis added). That statutory division of labor comports with long-settled law. *E.g.*, *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); *Pinkis v. Network Cinema*

Corp., 9 Wn. App. 337, 512 P.2d 751 (1973). In fact, this Court recognized that long-settled law in *McKee v. AT&T Corp.*, 164 Wn.2d 372, 394, 191 P.3d 845 (2008), where it considered unconscionability arguments only *after* determining that the party contesting arbitrability challenged "only and specifically . . . the dispute resolution and arbitration section" of the contract at issue; not the validity of the contract as a whole.

The upshot of this long-standing division of labor is that, where a party contests arbitrability by challenging the enforceability of the contract containing the arbitration clause, and not just the arbitration clause itself, an arbitrator must decide the question. This issue was settled decades ago by the U.S. Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 1270 (1967). In *Prima Paint*, the party seeking to avoid arbitration claimed that the contract containing the arbitration clause was induced by fraud, and that the entire contract, including the arbitration clause, was unenforceable. *Prima Paint*, 388 U.S. at 398-99. Applying federal arbitration law, the Court held that, "if a claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it," but that a court cannot "consider claims of fraud in the inducement of the contract generally." *Id.* at 403-04. The Court therefore enforced the arbitration clause contained

in the challenged agreement, and required arbitration of the plaintiffs' fraudulent inducement claims. *Id.* at 406-07. *Prima Paint* has been embraced by Washington courts, and repeatedly reaffirmed by the U.S. Supreme Court. *E.g.*, *Pinkis*, 9 Wn. App. 337; *Preston*, 552 U.S. 346; *Buckeye Check Cashing*, 546 U.S. 440. The *Prima Paint* rule is also reflected in the division of labor established in Washington's UAA. RCW 7.04A.060.

Here, the Homeowners contend that they challenged only "the arbitration provisions within Quadrant's Purchase and Sale agreements on procedural unconscionabilty grounds," and that a court—not an arbitrator—must consider those arguments. Pet. for Review at 4-5, 15. To the contrary, the Homeowners, who all state claims for rescission of the PSAs, contest the enforceability of the arbitration clauses by *explicitly challenging the formation of the PSAs*, not the arbitration provisions themselves. Recognizing that, the Court of Appeals properly reserved the Homeowners' procedural unconscionability challenge for the arbitrator pursuant to RCW 7.04A.030(3). Op. at 14.

For example, in the Homeowners' eighth cause of action, they claim that "[t]he *purchase and sale agreement* signed by [the Homeowners] and Defendant Quadrant is an adhesion contract obtained through Defendants' fraud." CP 26, 763, 786 (emphasis added). As a

result, the Homeowners claim that, "[t]he arbitration clause is invalid, unconscionable, and unenforceable." *Id.* The Homeowners do *not* claim that the arbitration clause itself was procured by fraud, so, pursuant to *Prima Paint* and Washington law, their procedural unconscionability claims must be determined by an arbitrator. *Id.*

The Homeowners' other procedural unconscionability arguments also target the PSAs themselves, not simply the arbitration provisions contained within them. For example, in their Petition, the Homeowners complain that the Court of Appeals "disregarded" evidence that the terms of the PSA were allegedly "not negotiable," that the Homeowners allegedly were denied an opportunity to review the PSAs, and that the Homeowners were allegedly subject to high pressure sales tactics. Pet. for Review at 6-7. But the Court of Appeals did not "disregard" that alleged evidence. To the contrary, the Court explicitly considered it, and correctly determined that all of those alleged facts "relate to the PSA as a whole," not the arbitration clauses in particular. Op. at 13-14. Accordingly, those issues are reserved for the arbitrator. Op. at 14.

The Homeowners also claim that the Court of Appeals ignored evidence that Quadrant failed to disclose information about defects and prior lawsuits relating to defects. Pet. for Review at 8. The Homeowners claim that, "had they been told the truth, they would not have agreed to an

arbitration clause in the agreements (let alone purchase a Quadrant home)." *Id.* Indeed, the Homeowners (who each state a claim for rescission) claim that they would never have signed the PSAs at all had Quadrant not allegedly concealed information.

> Paul Ysteboe:
>
> Had we known that mold and excessive moisture had been investigated and found in hundreds of Quadrant homes, that Quadrant's defective construction of homes was not limited to the few that resulted in the previous litigation and the construction process had not been fixed or changed to prevent continued defects, *I would never have agreed to the terms of the purchase and sale agreement* (including the arbitration clause) and *I would not have bought a Quadrant home*.

CP 139 (emphasis added).

> Vivian Lehtinen:
>
> Had we known that harmful particulate matter, mold and excessive moisture had been investigated and found in many Quadrant homes *we would never have agreed to purchase a Quadrant home*, let alone enter a purchase and sale agreement to buy a Quadrant home that contained an arbitration clause.
>
> . . . .
>
> Quadrant's high-pressure sales tactics and false representations, not only regarding the urgency surrounding our purchase but also the quality and safety of its homes, *induced us to sign the agreement and purchase the home*.

CP 674 (emphasis added).

> Jon Sigafoos:
>
> We were *induced to purchase our Quadrant home* by Quadrant's false statements, hard sell tactics, and nondisclosures.
>
> . . . .
>
> Had we known that mold and excessive moisture had been investigated and found in hundreds of Quadrant homes, that Quadrant's defective construction of homes was not limited to the few that had resulted in litigation, and that the construction process had not been fixed or changed to prevent continued defects, *we would never have decided to buy a Quadrant home* much less enter a purchase and sale agreement that contained an arbitration clause.

CP 679-80 (emphasis added).

> Bob Perez:
>
> Had we known that mold and excessive moisture had been investigation [sic] and found in hundreds of Quadrant homes, that Quadrant's defective construction of homes was not limited to the few that resulted in the previous litigation and the construction process had not been fixed or changed to prevent continued defects, *we would never have signed-up to wait for a Quadrant home* let alone to enter a purchase and sale agreement to buy a Quadrant home that contained an arbitration clause.

CP 133 (emphasis added).

In its Opinion, the Court of Appeals correctly recognized that those allegations, like the rest of the Homeowners' allegations with respect to procedural unconscionability, pertain to the enforceability of the PSAs themselves, not just the arbitration clauses within them. Op. at 14. The record simply does not support the Homeowners' contentions to the

contrary. Because the Court of Appeals correctly determined that the Homeowners are challenging the enforceability of the PSAs themselves, the Court of Appeals acted properly, and in accordance with long-settled law, in reserving those challenges for the arbitrator. *E.g.*, *Rojas v. TK Commc'ns, Inc.*, 87 F.3d 745, 749 & n.3 (5th Cir. 1996) (allegations contesting the enforceability of an agreement containing an arbitration clause, including a claim that the agreement was an unconscionable contract of adhesion, "belie Rojas' contention that her attack is limited to the arbitration clause and . . . support our conclusion that her attack is directed at the entire agreement"). Review of the Opinion is unnecessary.

C. WRECO and Weyerhaeuser Did Not Waive Their Rights to Compel Arbitration Under Washington Law.

The Court of Appeals also correctly determined that WRECO and Weyerhaeuser preserved their rights to compel arbitration in this case. In Washington, waiver is defined "as the voluntary and intentional relinquishment of a known right," and "cannot be found absent conduct inconsistent with *any other intention* but to forego a known right." *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc.*, 28 Wn. App. 59, 61-62, 621 P.2d 791 (1980) (emphasis added). Therefore, waiver is determined on a case by case basis according to the facts presented and the intentions demonstrated by the parties. *E.g.*, *id.* at 64 (three-month delay

in moving to compel arbitration and limited use of discovery insufficient to constitute waiver); *Ives v. Ramsden*, 142 Wn. App. 369, 379, 174 P.3d 1231 (2008) (party waived right to compel arbitration after litigating for three and a half years, engaging fully in discovery, and moving to compel arbitration on the "eve of trial").

Nevertheless, the Homeowners suggest that any motion for summary judgment, made under any circumstances at any point in a case, constitutes a waiver of the right to compel arbitration. Pet. for Review at 18. That simply is not true. Depending on the facts of the case, courts *do* compel arbitration even when the party seeking arbitration has also moved for summary judgment. *E.g.*, *Keytrade USA, Inc. v. AIN TEMOUCHENT M/V*, 404 F.3d 891, 897 (5th Cir. 2005) ("extensive summary judgment motion—in excess of 100 pages" insufficient to constitute waiver of right to arbitrate when filed "from a defensive posture"); *Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 761 F.2d 855, 862 (2d Cir. 1985) (no waiver even though party moved for summary judgment).

As the Court of Appeals correctly noted in its Opinion, the central issue in WRECO's and Weyerhaeuser's summary judgment motion was "whether WRECO and Weyerhaeuser were proper parties." Op. at 18. Indeed, although WRECO and Weyerhaeuser submitted evidence outside

the pleadings, they submitted only two declarations, one from a WRECO executive and one from a Weyerhaeuser executive, for the *sole* purpose of clarifying the corporate relationships between Quadrant, WRECO, and Weyerhaeuser, and, accordingly, the Homeowners' lack of privity with WRECO and Weyerhaeuser. CP 802-05 (Sowell & Hanson Decls.). The Homeowners cite no authority suggesting that a motion of that sort constitutes a waiver on the facts presented here.

The Homeowners contend that the Court of Appeals' Opinion conflicts with *Naches Valley Sch. Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 775 P.2d 960 (1989), but that case is inapposite. Pet. for Review at 19-20. In *Naches Valley*, three retired teachers asked the Naches Valley School District to pay them for unused sick leave. *Naches Valley*, 54 Wn. App. at 390-91. They were joined in that request by the Naches Valley Education Association. *Id.* at 391. After the Association requested arbitration pursuant to the collective bargaining agreement, the District filed an action in state court and sought an order precluding arbitration. *Id.* The three teachers moved for summary judgment on the merits, and the Association asked the court to order arbitration of all claims asserted by all members of the Association, including the three retired teachers. *Id.* The court refused to compel arbitration, and granted the teachers' motions for summary judgment. *Id.* On appeal by the Association, the panel

ordered arbitration of the Association's claims, but held that the three retired teachers, who *never* sought to enforce their rights to compel arbitration, had waived their right to compel arbitration by moving for and winning summary judgment. *Id.* at 395-96. That outcome is hardly surprising, given that the three teachers never, at any point, joined the Association's requests to compel arbitration.

This case is nothing like *Naches Valley*. Here, WRECO and Weyerhaeuser moved immediately for summary judgment on all claims asserted by the Perezes and Ysteboes on the simple ground that no privity existed between those Homeowners and WRECO and Weyerhaeuser. That motion was denied *without prejudice*. CP 342. WRECO and Weyerhaeuser then joined Quadrant in moving to compel arbitration. Therefore, unlike the teachers in *Naches Valley*, who *never* requested arbitration, WRECO and Weyerhaeuser actually moved to enforce their rights compel arbitration. *Lake Wash.*, 28 Wn. App. at 62 (waiver "cannot be found absent conduct inconsistent with any other intention but to forego a known right" to arbitrate). In its Opinion, the Court of Appeals properly held that those actions preserved WRECO's and Weyerhaeuser's rights to compel arbitration. Op. at 19.

Indeed, this is not a case in which the party seeking to compel arbitration did so after engaging in extensive litigation for years. *See Ives*,

142 Wn. App. at 379. Nor is it a case of forum shopping, as the Homeowners suggest, since the motion for summary judgment was denied without prejudice and can be relitigated either in the trial court or in arbitration.[6] WRECO and Weyerhaeuser moved immediately for summary judgment on the basis that they were not proper parties, had their motion denied without prejudice, then moved to compel arbitration before engaging in any discovery or taking any other significant action. Given those facts, it is not surprising that the Homeowners failed to raise a waiver argument in the trial court, and the Court of Appeals correctly held that no waiver has occurred. Review of that holding is unnecessary.

VI. CONCLUSION

The Court of Appeals properly applied long-standing statutory and case law in compelling all of the claims asserted in this action to arbitration. Its Opinion complies with the decisions of this Court and with the Court of Appeals, and addresses no issues of constitutional law or novel issues of significant public interest. The Petition for Review should be denied.

---

[6] In fact, as noted above, the trial court has indicated that it intends to reconsider and grant WRECO's and Weyerhaeuser's motion for summary judgment, but any further action in this matter is stayed pending appeal. CP 1763.

Dated this 9th day of April, 2010.

Respectfully submitted,

HILLIS CLARK MARTIN & PETERSON, P.S.

By _____

Michael R. Scott, WSBA #12822
Laurie Lootens Chyz, WSBA #14297
Jake Ewart, WSBA #38655
1221 Second Avenue, Suite 500
Seattle, WA 98101-2925
Telephone: (206) 623-1745
Attorneys for Defendants-Appellants
The Quadrant Corporation, Weyerhaeuser Real Estate Company, and Weyerhaeuser Company

CERTIFICATE OF SERVICE

On the date indicated below, I, Brenda K. Partridge, legal assistant, hereby certify that I caused to be served upon all counsel of record, via legal messenger service, a true and correct copy of the foregoing document.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of April, 2010, at Seattle, Washington.

_____
Brenda K. Partridge

ND: 11101.317 4835-7912-2949v1 4/9/2010

HCMP
HILLIS
CLARK
MARTIN &
PETERSON
law offices

April 9, 2010

Ronald R. Carpenter
Clerk
Washington State Supreme Court
P.O. Box 40929
Olympia, WA 98504

Re: *Townsend, et al. v. The Quadrant Corporation, et al.;*
Court of Appeal No. 62700-7-I

84422-4

Dear Mr. Carpenter:

Enclosed are an original and copy of the Answer to Petition for Review. Please return a conformed copy in the enclosed self-addressed, stamped envelope.

Very truly yours,

Brenda K. Partridge
Assistant to Laurie Lootens Chyz

bkp
Enclosures

cc: Lory R. Lybeck

ND: 11101.317 4816-0734-9765v1

1221 Second Avenue
Suite 500
Seattle, Washington
98101-2925

phone 206.623.1745
fax 206.623.7789
www.hcmp.com

RICHARD D. JOHNSON, *Court Administrator/Clerk*

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

April 2, 2010

The Ronald R. Carpenter
Clerk of the Supreme Court
Temple of Justice
Olympia, WA 98504-0511

Dear Mr. Carpenter:

84422-4

Re: 62700-7-I, Donia Townsend, et al. vs. Quadrant Corp., et al.

Please acknowledge receipt of the following on the enclosed copy of this letter:

2 Appellate court file
2 Trial court file
0 Appellant's briefs
0 Respondent's briefs
0 Reply briefs

This record has been forwarded for the Supreme Court's convenience in making a determination on the petition for review filed in the above appeal.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

hek

Enclosures

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

April 2, 2010

Laurie Lootens Chyz
Attorney at Law
1221 2nd Ave Ste 500
Seattle, WA, 98101-2989

Michael Ramsey Scott
Hillis Clark Martin & Peterson
1221 2nd Ave Ste 500
Seattle, WA, 98101-2925

Lory Ray Lybeck
Lybeck Murphy LLP
7525 SE 24th St Ste 500
Mercer Island, WA, 98040-2334

Michael Jacob Ewart
Hillis Clark Martin & Peterson
1221 2nd Ave Ste 500
Seattle, WA, 98101-2925

Katherine Lynn Felton
Brian Clifford Armstrong
Benjamin R Justus
Lybeck Murphy LLP
7525 SE 24th St Ste 500
Mercer Island, WA, 98040-2334

84422-4

CASE #: 62700-7-I
Donia Townsend, et al., Resps. vs. Quadrant Corporation, et al., Apps.

Counsel:

A petition for review has been filed in the above case. It appears from the record that counsel has been served with a copy of the petition for review.

Counsel is advised to review RAP 13.4(d) in regard to the filing of an answer to the petition for review.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

hek

c: The Honorable Ronald R. Carpenter ✓
Clerk of the Supreme Court

RICHARD D. JOHNSON, *Court Administrator/Clerk*

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

April 2, 2010

The Ronald R. Carpenter
Clerk of the Supreme Court
Temple of Justice
Olympia, WA 98504-0511

Dear Mr. Carpenter:

84422-4

Re: 62700-7-I, Donia Townsend, et al. vs. Quadrant Corp., et al.

Please acknowledge receipt of the following on the enclosed copy of this letter:

2 Appellate court file
2 Trial court file
0 Appellant's briefs
0 Respondent's briefs
0 Reply briefs

This record has been forwarded for the Supreme Court's convenience in making a determination on the petition for review filed in the above appeal.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

hek

Enclosures